

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

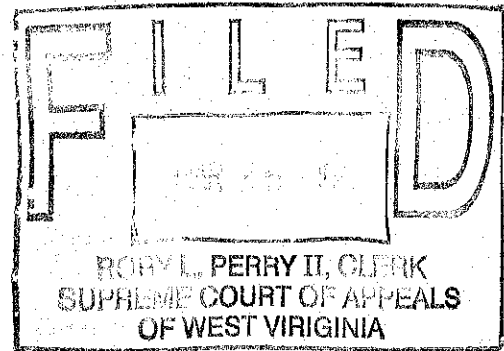
STATE OF WEST VIRGINIA *ex rel.*,
ALAN D. BAKER,

Petitioner,

v.

DAVID H. BOLYARD, DIRECTOR,
DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA,

Respondent.



BRIEF OF APPELLEE

Respectfully submitted,

WEST VIRGINIA DIVISION
OF MOTOR VEHICLES,

By Counsel

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NO. 33303

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ALAN D. BAKER,

Appellant,

v.

DAVID H. BOLYARD, DIRECTOR,
DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA,

Appellee.

BRIEF OF APPELLEE

Comes now the Appellee, David H. Bolyard, Director, West Virginia Division of Motor Vehicles, and the State of West Virginia, (hereinafter, "Appellee" or "Division") by counsel, Janet E. James, Assistant Attorney General, and submits this brief in response and opposition to *Appellant's Brief*, filed on behalf of Alan D. Baker. Appellant appeals denial of a *Petition for Review of Final Order of the Commissioner of the West Virginia Division of Motor Vehicles* by *Order* of the Honorable James J. Rowe, Judge of the Circuit Court of Greenbrier County, entered on August 21, 2006.

I.

KIND OF PROCEEDING AND THE NATURE OF THE RULING BELOW

Appellant was arrested in Greenbrier County on July 31, 2005, for driving under the influence of alcohol (hereinafter, "DUI"). An administrative hearing was timely requested by Appellant, and was held on October 17, 2005. Subsequently, the Division received an Abstract of Judgment from the Magistrate Court of Greenbrier County showing that Appellant pled *nolo contendere* to the charge of DUI first offense on October 27, 2005. On December 9, 2005, the Division entered an *Order of Revocation* by which Appellant's privilege to drive was revoked on conviction.

On or about January 9, 2006, Appellant, by counsel, filed a *Petition for Review of Final Order of the Commissioner of the West Virginia Division of Motor Vehicles* in the circuit court of Greenbrier County (Civil Action No. 06-C-04), arguing that the Division violated his due process rights by revoking him based upon the no contest plea, and by failing to issue an order based upon the administrative hearing. The Appellee, by counsel, Greenbrier County Prosecuting Attorney Kevin Hanson, filed a *Motion to Dismiss* on the basis that the circuit court of Greenbrier County lacked jurisdiction and venue. The motion was denied by order entered January 26, 2006.

By Order entered on February 27, 2006, the Honorable James J. Rowe denied the *Petition for Review of Final Order of the Commissioner of the West Virginia Division of Motor Vehicles* and remanded the matter to the Division to give the Appellant thirty days in which to request a "further hearing".

By letter dated March 13, 2006, the Division's Director of Legal Services advised Appellant that he would be granted an "identity" hearing, the scope of which would be whether he was the person named in the Abstract of Conviction pursuant to which his license was revoked.

On or about April 7, 2006, Appellant filed a *Petition for Contempt* in the circuit court, averring that the Division refused to give him an evidentiary hearing, contrary to the order of the circuit court. On April 14, 2006, Judge Rowe entered an Order declining to issue a rule to show cause, and setting the matter for hearing. On June 12, 2006, the parties once again appeared before the circuit court on Appellant's *Petition for Review of Final Order of the Commissioner of the West Virginia Division of Motor Vehicles*. In the *Order* of that same date, Judge Rowe took the matter under advisement.

On August 21, 2006, the parties once again convened before the circuit court on Appellant's *Petition for Review of Final Order of the Commissioner of the West Virginia Division of Motor Vehicles*, and by Order of that date the circuit court affirmed the Division's order, but stayed revocation of the Appellant's privilege to drive for 60 days "pending appeal."

On or about September 29, 2006, Appellant filed the present *Petition of Appeal* in this Honorable Court.

II.

ISSUE PRESENTED

WHETHER THE CIRCUIT COURT WAS CORRECT IN AFFIRMING THE DIVISION'S ORDER OF REVOCATION, WHICH WAS PREDICATED UPON HIS PLEA OF NOLO CONTENDERE TO DRIVING UNDER THE INFLUENCE OF ALCOHOL?

III.

STANDARD OF REVIEW

"Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.' Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)." Syl. pt. 5, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

IV.

ARGUMENT

APPELLEE PROPERLY REVOKED THE LICENSE OF THE APPELLANT ON THE BASIS OF HIS *NOLO CONTENDERE* PLEA TO DRIVING UNDER THE INFLUENCE OF ALCOHOL.

Appellant challenges the Appellee's interpretation of *State ex rel. Stump v. Johnson*, 217 W. Va. 733, 619 S.E.2d 246 (2005), filed by this Court on July 7, 2005, and the consequent revocation of his privilege to drive pursuant to W. Va. Code § 17C-5A-1a.

Appellant mis-states the standard for inquiry in this case, citing the Administrative Procedures Act standard for review in an administrative appeal. This is, in fact, a case in which extraordinary relief was sought from the circuit court. However, the Appellee's motion to dismiss on that basis was denied by the circuit court. Despite the fact that the circuit court of Greenbrier County improperly retained jurisdiction of the case, it arrived at the proper conclusion with regard to the Division's order of revocation.

In *Stump, supra*, this Court made clear that the Division must revoke on conviction not only in the instances where a driver has pled guilty to the offense of DUI, but also when he pleads *nolo*

contendere to DUI. "It is undisputed from the record that Bishop was convicted of DUI after apparently entering a 'no contest' plea." *Stump*, 217 W. Va. at 742, 619 S.E.2d at 255. "In giving effect to the plain language contained within W. Va. Code § 17C-5A-1a(e), we find that a person pleading guilty or found guilty by a court or jury of driving under the influence of alcohol, . . . shall be considered 'convicted,' and that the Commissioner has a mandatory duty to revoke the person's license to operate a motor vehicle in the State of West Virginia as provided by W. Va. Code § 17C-5A-1a(a)." *Id.* Following issuance of the opinion in *Stump, supra*, the Division revoked the driving privileges of those who pled *nolo contendere* to DUI. Therefore, Appellant's plea of *nolo contendere*, entered on October 27, 2005, formed the basis for the mandatory revocation of his privilege to drive.

Appellant challenges this practice, citing *University of West Virginia Bd. of Trustees on Behalf of West Virginia University v. Fox*, 197 W.Va. 91, 475 S.E.2d 91 (1996). Although this Court held in *Fox* that the Appellant's *nolo contendere* plea could not be used in a grievance proceeding, the Court noted that there are administrative proceedings in which the relevant statutory provisions do allow for use of such a plea. "Many of the decisions permitting a no-contest plea to be used in administrative proceedings were based upon specific statutory provisions of a type not at issue in the instant case." 197 W.Va. 95 n.4, 475 S.E.2d 95 n.4. The Court further noted: "We recognize that where the issue is whether or not a person has been previously 'convicted', a judgment of conviction based upon a *nolo contendere* plea may indeed be admitted into evidence to litigate that issue. Such might be applicable where a statute attaches an enhanced criminal penalty for successive offenses or provides an administrative penalty in the event of a 'conviction.'" 197 W.Va. 96, 475 S.E.2d 96.

The Division's statutory scheme falls within the exceptions discussed by the Court in *Fox*.

W. Va. Code § 17C-5A-1a provides for mandatory revocation upon conviction:

(a) If a person is convicted for an offense defined in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section because the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, or did drive a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, and if the person does not act to appeal the conviction within the time periods described in subsection (b) of this section, the person's license to operate a motor vehicle in this state shall be revoked or suspended in accordance with the provisions of this section.

(b) The clerk of the court in which a person is convicted for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section shall forward to the commissioner a transcript of the judgment of conviction. If the conviction is the judgment of a magistrate court, the magistrate court clerk shall forward the transcript when the person convicted has not requested an appeal within twenty days of the sentencing for such conviction. If the conviction is the judgment of a mayor or police court judge or municipal court judge, the clerk or recorder shall forward the transcript when the person convicted has not perfected an appeal within ten days from and after the date upon which the sentence is imposed. If the conviction is the judgment of a circuit court, the circuit clerk shall forward the transcript when the person convicted has not filed a notice of intent to file a petition for appeal or writ of error within thirty days after the judgment was entered.

(c) If, upon examination of the transcript of the judgment of conviction, the commissioner shall determine that the person was convicted for an offense described in section two, article five of this chapter or for an offense described in a municipal ordinance which has the same elements as an offense described in said section because

the person did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or the combined influence of alcohol or controlled substances or drugs, or did drive a motor vehicle while having an alcohol concentration in his or her blood of eight hundredths of one percent or more, by weight, the commissioner shall make and enter an order revoking the person's license to operate a motor vehicle in this state. If the commissioner determines that the person was convicted of driving a motor vehicle while under the age of twenty-one years with an alcohol concentration in his or her blood of two hundredths of one percent or more, by weight, but less than eight hundredths of one percent, by weight, the commissioner shall make and enter an order suspending the person's license to operate a motor vehicle in this state. The order shall contain the reasons for the revocation or suspension and the revocation or suspension periods provided for in section two of this article. Further, the order shall give the procedures for requesting a hearing which is to be held in accordance with the provisions of said section. The person shall be advised in the order that because of the receipt of a transcript of the judgment of conviction by the commissioner a presumption exists that the person named in the transcript of the judgment of conviction is the person named in the commissioner's order and such constitutes sufficient evidence to support revocation or suspension and that the sole purpose for the hearing held under this section is for the person requesting the hearing to present evidence that he or she is not the person named in the transcript of the judgment of conviction. A copy of the order shall be forwarded to the person by registered or certified mail, return receipt requested. No revocation or suspension shall become effective until ten days after receipt of a copy of the order.

(d) The provisions of this section shall not apply if an order reinstating the operator's license of the person has been entered by the commissioner prior to the receipt of the transcript of the judgment of conviction.

(e) For the purposes of this section, a person is convicted when the person enters a plea of guilty or is found guilty by a court or jury.

The statute clearly contemplates that a conviction of DUI constitutes sufficient evidence to support revocation. As the Court noted in *Stump, supra*, "It is undisputed from the record that Bishop was convicted of DUI after apparently entering a 'no contest' plea." *Stump*, 217 W. Va. at 742, 619

S.E.2d at 255. Therefore, because a plea of *nolo contendere* amounts to a conviction for revocation purposes, the need for further proceedings is eliminated. It is for that reason that no order was issued following the Appellant's administrative hearing.

This Court has repeatedly affirmed the mandatory nature of revocations on conviction pursuant to this Code section. (See, *Stump*, 217 W. Va. at 741-42, 619 S.E.2d at 254-55: "Moreover, Bishop's 'ancillary to a criminal action' argument ignores the specific language of W. Va. Code § 17C-5A-1a which clearly anticipates an action by the Commissioner, separate and distinct from any criminal proceeding, for the administrative revocation of drivers' licenses upon convictions for driving under the influence of alcohol, controlled substances or drugs"; and *David v. Commissioner of West Virginia Div. of Motor Vehicles*, 2006 WL 1312089 (W. Va. 2006) (Benjamin, J., Concurring).

Appellant contends that a legislative rule which became effective after his conviction for DUI conflicts with the Division's actions in this case. On March 19, 2006, the Legislature passed a "rules bill" which included an amendment to 91 C.S.R.5-14.1 (effective May 15, 2006). The rule, with the amendment underlined, reads:

The Division shall revoke a licensee's privilege to operate a motor vehicle in accordance with the provisions of W. Va. Code §§ 17C-5-7 and 17C-5A-1 et seq. if the licensee drives under the influence of alcohol, controlled substances or drugs, refuses to submit to a designated secondary chemical test, or commits any other related offense found within W. Va. Code §§ 17C-5-7 and 17C-5A-1 et seq. For the purposes of this rule, a plea of *nolo contendere* stands as neither an admission of guilt nor a conviction for administrative revocation proceedings.

Consequently, from May 15, 2006, the Division no longer revokes on conviction in instances where a driver has pled *nolo contendere* to DUI. Obviously, the time frames applicable to passage of and

effectiveness of this rule do not affect the present case. Inasmuch as the Petitioner's *nolo contendere* plea occurred on October 27, 2005, it was within the "window" of time between the issuance of *Stump, supra*, and the effective date of the above-cited legislative rule.

The Division properly revoked Appellant based upon its receipt of the Abstract of Judgment showing his *nolo contendere* plea to DUI on October 27, 2005. It was under no obligation to proceed with issuance of an order based upon the administrative hearing. Appellant was granted a second opportunity to the "identity" hearing to which he was entitled, by Judge Rowe's *Order* of February 27, 2006, in which he remanded the matter to the Division for hearing. However, Appellant did not avail himself of that opportunity, which he has now waived. The Division's *Order of Revocation* dated December 9, 2005 is proper and must stand.


V.

CONCLUSION

WHEREFORE, based upon the foregoing, the Appellee hereby respectfully requests that the circuit court's *Order*, entered August 21, 2006, be affirmed.

Respectfully submitted,
DAVID H. BOYLARD, DIRECTOR,
DIVISION OF MOTOR VEHICLES,
STATE OF WEST VIRGINIA,
By Counsel,

DARRELL V. McGRAW, JR.
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Respondent.

CERTIFICATE OF SERVICE

I, Janet E. James, Assistant Attorney General, do hereby certify that the foregoing *Brief of Appellee* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 26th day of March, 2007, addressed as follows:

E. Lavoyd Morgan, Jr., Esquire
Post Office Box 1847
Lewisburg, WV 24901


JANET E. JAMES